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Office Supreme Court U. S.
FILED
APR 1 1901
JAMES H. McKENNEY,
Clerk.

No. 249.

Brf. of Carson Pro se.

Filed April 1st 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 249.

WILLIAM H. CARSON,
Plaintiff in Error,

vs.

THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, PLYMOUTH COUNTY, MASSACHUSETTS,
Defendants in Error.

STATEMENT AND BRIEF FOR THE PLAINTIFF IN ERROR

—BY—

WILLIAM H. CARSON, Attorney pro se.

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IN THE

Supreme Court of the United States.

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NO. 249.

WILLIAM H CARSON,
Plaintiff in Error.

vs.

THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, PLYMOUTH COUNTY, MASSACHUSETTS,
Defendants in Error.

Statement and Brief for the Plaintiff in Error.

STATEMENT OF THE CASE.

The petitioner in this case, William H. Carson, is now, and was at the bringing of the original petition in this case in the Supreme Court of Massachusetts, the owner of certain parcels of real estate situated on Main and Allen Streets, in the City of Brockton, County of Plymouth, of the aforesaid Commonwealth. (see Schedule A end of p. 10 Tr. Rec. Page 7).

The defendants are the Sewerage Commissioners of the aforesaid City of Brockton.

This action was begun in the Supreme Court of Massachusetts by a petition for a writ of Certiorari to quash and annul a quarterly sewerage assessment of $42.53 levied upon the property of the petitioner for the use of the public sewer of the City of Brockton (see Exhibit B, p. 11 & 12 Tr. Rec. Page 7).

The petitioner alleged in his writ the following reasons why his prayer should be granted:

1. Because said ordinance under which said tax or sewerage rental was made, does not provide for either notice of hearing of persons whose estates are affected thereby, which is contrary to, and in violation of, articles 10, 11, 15, of part I of the constitution of Massachusetts.

2. Because the method of computing such sewerage charges, which your petitioner was informed was adopted by said sewerage commissioners to wit: "For unmetered water service eight dollars ($8.00). For metered water service thirty cents per 1,000 gallons of sewerage delivered to the sewer the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than $8." is unreasonable and disproportionate, and in violation of Sec. 4, Chap. 1, part II, of the constitution of Massachusetts.

3. Because your petitioner, having already paid for the sewers connected with his land, cannot be compelled to pay a special tax or rental for the maintenance and operation of sewers from which he receives no special benefit.

4. Because said tax or sewer rental and the ordinance authorizing the same, is in violation of the provisions of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, and is therefore illegal and void.

5. Because said tax or sewerage charge is permissible under the Constitution of this Commonwealth, or under the Constitution of the United States, only when founded upon special and peculiar benefits to the property so taxed, and then only to the amounts of such special and peculiar benefits.

6. Because, where lands have been assessed for special benefits from the construction of sewers by whose operations they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of said sewers such as to subject

them to a special tax or charge, for the reason that expenses of this kind should be made subject of general taxation.

Wherefore your petitioner prays for a writ of Certiorari to be directed to the Board of Sewerage Commissioners of the City of Brockton directing them to bring up before your Honors the several proceedings aforesaid; that said proceedings as to said assessments may be quashed and that your petitioner may have such other relief, including costs, as he may be entitled to in the premises.

WILLIAM H. CARSON,
Att'y pro se.

Filed July 26, 1899.

(See p. 10 Tr. Rec., p. 6).

To this petition the respondents through their attorney, file the following general demurrer:

DEMURRER.

And now comes W. F. Cleveland, A. C. Thompson, and F. Herbert Snow, sewerage commissioners of the City of Brockton, respondents, and demur to the petitioner's bill and say that said bill and matters therein contained, in manner and form as the same are stated and set forth, are not sufficient in law for the petitioner to have his writ against the respondents; for that it does not from said petition show that the proceedings against him were unjust, unlawful, unconstitutional or beyond the power of said defendants.

Wherefore they pray that said petition be dismissed.

By their Attorney,
F. M. BIXBY.

I hereby certify that I am of opinion that there is such probable ground in law for the above demurrer

as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

F. M. BIXBY.

Filed August 8, 1899.

(P. 25 Tr. of Rec. page 8).

The cause came up for a hearing before a single justice of the Supreme Court and upon petitioner and respondents disclaiming any wish to amend their pleadings, at the request of petitioner and respondents the case was reserved for the determination of the full Supreme Court upon the pleadings.

The case was submitted to the full Court upon briefs, no argument being made and on the 30th day of January, 1899, the prayer of the petitioner was denied.

The respondents in this cause derived their authority to levy the assessment declared upon from the City Council of the City of Brockton. On August 23rd, 1894, the aforesaid Council of the City of Brockton passed an ordinance relating to sewers and sewerage assessments which is given in full, see p. 6 to 9, pages 2 to 5, Tr. Rec.

Sec. 4 of the aforesaid ordinance is here appended as being the vital section of the ordinance which affects this case.

> "Section 4. Every person or owner of an estate who enters his particular sewer into a common sewer, shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: for unmetered water service, $8.00; for metered water service, thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than $8.00, it being provided, however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners

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and approved by the Mayor and Aldermen; and it being further provided that any such person or owner may place at his own expense a water meter which shall be approved by the said commissioners to measure the amount of water which does not enter the sewer.

"Such charges shall be collected quarterly and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the City of Brockton." (P. 8 Tr. Rec. page 4.)

It will be seen that the City of Brockton derive their power to levy quarterly assessment declared upon under the provision of an act of the Massachusetts legislature Chapter 245 Sec. 1-4 of the acts of 1892 (see Sec. 1 of ordinance P. 6 Tr. Rec. page 3) and as these sections of the aforesaid act are the only ones that have any bearing upon this case they are hereby appended.

"Chap. 245 of the acts of 1892.

An act to give greater powers to Cities and Towns in relation to the construction of sewers.

"Be it enacted etc., as follows:

"Section 1. The city council of any city ex-
"cept Boston, or a town, in which common sew-
"ers are laid under the provisions of sections one,
"two and three of chapter fifty of the Public
"Statutes, or a system of sewerage is adopted
"under the provisions of section seven of said
"chapter, may by vote establish just and equi-
"table annual charges or rents for the use of
"such sewers, to be paid by every person who
"enters his particular sewer into the common
"sewer, and may change the same from time
"to time. Such charges shall constitute a lien
"upon the real estate using such common sewer,
"to be collected in the same manner as taxes
"upon real estate, or in an action of contract
"in the name of such city or town. Sums of

"money so received may be applied to the pay-
"ment of the cost of maintenance and repairs
"of such sewers or of any debt contracted for
"sewer purposes.

"Section 4. The mayor and alderman of
"any city and the selectmen of any town in
"which common sewers have been laid, may
"lay, make and maintain particular sewers from
"common sewers to the street line, and partic-
"ular sewers so laid shall be the property of the
"city or town.

"The owner of any estate benefited by such
"particular sewer shall pay to the city or town
"towards the cost thereof, and for the perma-
"nent privilege of using the same, such reason-
"able sum as the mayor and aldermen or select-
"men may determine; and said sum may be fix-
"ed at the estimated average cost of all such
"particular sewers, within the territory for
"which a system of sewers has been built or
"adopted. Said mayor and aldermen or select-
"men may, if requested by the owner of any es-
"tate so to do, construct a particular sewer from
"the street line to any house or building and
"charge said owner the actual cost thereof; and
"may make rules and regulations for the con-
"struction and use of all particular sewers, and
"may impose penalties not exceeding Twenty
"(20) Dollars for their violation."

In the opinion of the Court below (P. 45, 46, page 11 Tr. Rec.) reference is made to the Public Statutes Chapter fifty Section 1-3-7, but as the petitioner in this case is not contesting the first original assessment against his land for the construction of the sewer Chapter fifty of the Public Statutes has no bearing on this case. The questions in this case are first. The constitutionality of the legislative act of 1892, Chapter 245 empowering the Brockton City Government to levy an annual or quarterly charge or assessment upon the property of the petitioner for the maintenance and the operation of the sewers of said City of Brockton. Second: The validity of the ordinance of the Brock-

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ton City Government quoted above to levy such annual or quarterly rents, charges or assessments upon the property of the plaintiff in error for the operation and maintenance of the whole sewerage system of the City of Brockton. The contention of the plaintiff in error is that both statute and ordinance referred to above are unconstitutional and void as providing for neither notice, hearing, or right of appeal of the property owner and on other federal grounds more particularly set forth in the assignment of errors that follows.

ERRORS RELIED UPON.

(1) That by the record aforesaid it was decided in and by the said decree that the ordinance in relation to sewerage and sewerage assessments for the City of Brockton in the County of Plymouth, Commonwealth of Massachusetts, which aforesaid ordinance was passed by the common council of said City of Brockton, August 23, 1894, to be ordained in conference by the Board of Aldermen of the said City of Brockton, and was approved September 4, 1894, by John J. Whipple, Mayor of the said City of Brockton, said ordinance being passed by the power derived from the statute of 1892, Chapter 245 and Chapter fifty of the Public Statutes of the aforesaid Commonwealth, were valid are not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid ordinance and the statutes aforesaid were repugnant to the provisions of the said Constitution that no state shall deprive any person of property without due process of law.

(2) That by the aforesaid record it appears that it was decided in and by the said decree that the charges set forth in section 4 of the said ordinance, to wit, for unmetered water service Eight dollars ($8.00); for metered water service thirty (30ct.) cents per

thousand gallons of sewerage delivered to the sewer, came within the meaning of the statutes as equitable and just, and not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid charges for delivering the sewerage to the sewer were unjust and inequitable, invalid, and repugnant to the Constitution of the United States for the reason that such charges in and of themselves amounted to the taking or destruction of the property of the petitioner.

(3) There is also manifest error in this, to wit, that by the record aforesaid it appears that the prayer of the petitioner therein mentioned for the writ of certiorari was denied by the said decree, whereas a writ of certiorari ought to have been thereby granted, as in the said petition prayed.

ADDITIONAL ASSIGNMENT OF ERRORS.

(4) The Court erred in holding that the language in the ordinance or the statute referred to provided either in express terms or by implication for notice or hearing to the petitioner whereas, it ought to have been held that as the ordinance and the statute complained of did not in express language or by fair implication provide for notice and hearing to the petitioner at some stage of the proceedings before the said charge or assessment became a lien upon the property of the petitioner, that such failure to provide for notice and hearing was contrary to the provisions of Section I of the Fourteenth Amendment of the Constitution of the United States and therefore illegal and void as a taking of property without due process of law.

(5) The Court erred in ruling that the acts of 1892, Chapter 245 were constitutional, for by such acts the City council of Brockton were empowered to fix an annual rent charge or assessment for the use of the sewers of the City of Brockton which should be-

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come a lien upon the property of the petitioner, and it further empowered them to "Change the same from time to time" whereas it should have been held that the language of the statute was unconstitutional and void for the reason that it made no fixed and certain charge and gave to the City Council of Brockton the power to change such annual or quarterly charges at any time or times irrespective of any special and peculiar benefit accruing to the petitioner's property which is repugnant to the provision of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall deprive any person of life, liberty, or property without due process of law.

(6) The Court erred in holding that the words "Just and equitable" as used in section 1 of the acts of 1892, Chapter 245 were sufficiently certain as a standard of assessment, whereas the Court should have held that as the words import no special limitations they cannot be regarded as laying down a rule or standard by which the benefit to the petitioner could be proportioned to the amount of the assessment charge, and that the words aforesaid are repugnant to the provisions of the Constitution of Massachusetts, and to the Fourteenth Amendment of the Constitution of the United States.

(7) That by the record aforesaid it appears that it was decided in and by the said decree that the ordinance in relation to sewerage and sewerage assessments for the City of Brockton and of the aforesaid acts of the State Legislature in regard to sewerage and sewerage assessments, that the keeping of the sewer in condition for use by such further expenditure as was necessary by the City was a further and special benefit to the property of the petitioner for which the property of the petitioner could be assessed by the City of Brockton whereas, it should have been held, that the petitioner having paid for the original construction of the sewer he was entitled to the use of the same, and that connecting his property with the sewer was not such a further and

special benefit as would warrant the City in levying an assessment for its use, and as such assessment became a lien upon the property of the petitioner it amounted to unjust, inequitable and unequal taxation and was repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States.

(8) That by the aforesaid Record it appears that it was decided in and by the aforesaid decree that the assessment of $42.53 made upon the property of the petitioner by the Brockton City Government under the authority derived from the ordinance aforesaid and of the acts of 1892, chapter 245 for the maintenance and operation of the sewers of the City of Brockton was not a subject for general taxation, and was therefore constitutional, and not repugnant to the constitution of Massachusetts or of the Fourteenth Amendment of the Constitution of the United States, whereas it should have been held that such assessment levied against the property of the petitioner by the Brockton City Government was discriminating against the petitioner's property by levying an assessment to pay for the maintenance and operation of the whole sewerage system of the aforesaid City of Brockton, which is a tax that should be borne by the whole people, and that as such tax can be enforced by the sale of the plaintiff's property, it is contrary to the provisions of the constitution of Massachusetts and on the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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POINTS.

I.

(1.) Where lands are to be assessed for local improvement and such improvement is not made compulsory by the State Legislature, notice to the property owner and provision for a hearing is essential to the validity of the act. In such cases the land owner has a right to be heard.

(2.) The act of 1892, Chapter 245 is void as providing neither notice or hearing to the land owner who is to be assessed.

(3.) The words in the statute of 1892, Chapter 245, Section 1, authorizing the City Council of Brockton to change the rates of sewerage charges or assessments from time to time clearly manifest an intention on the part of the legislature to assess such property connected with the sewer without regard to benefits; and the statute is therefore unconstitutional and void.

Norwood vs. Baker, 172 U. S. 282;
(Full opinion of Court and cases cited.)
Hager vs. Reclamation District, 111 U. S. 701-709;
Spencer vs. Merchant, 125 U. S. 345-346;
Fall Brook Irrigation District vs. Bradley, 164 U. S. 112 and cases cited.
Stewart vs. Palmer, 74 N. Y. 189;
Davidson vs. New Orleans, 96 U. S. 97;
Thomas vs. Gain, 35 Michigan 155-156.

II.

(1.) The words "just and equitable" as they appear in Section 1, act of 1892, Chapter 245 of the Massachusetts statute relating to sewers and sewerage assessments furnishes no legal standard of assessment, as it

does not measure or limit either the amount of the assessment or the benefit to be received. The words are vague, uncertain, and import no special limitation.

Barnes vs. Dyer, 56 Vermont 471;
State vs. Newark, 8 Vr. (N. J.), 415;
New Brunswick Rubber Co. vs. The Commissioners etc., 9 Vr. (N. J)., 190;
Hammett vs. Philadelphia, 65 Penn. St. 146;
State vs. Mayor etc. Paterson, 8 Vr. (N. J.) 412;
Bogert vs. Elizabeth City, 27 N. J. Eq. 568, 569;
Washington Avenue case, 69 Pennsylvania St. 352.
State Evans, Pros., vs. Mayor, etc. of Jersey City, 6 Vr. (N. J.) 381.

III.

(1.) The maintenance and operation of a sewer, the benefit of which accrues to the whole city in which it is located, irrespective of individual ownership of lands, is a subject for general taxation on personal as well as real estate, and is not a subject for a special assessment.

Beals vs. Street Commissioners of Boston, 53 North Eastern Rep. 876;
Hammett vs. Philadelphia, 65 Penn. St. 146;
Washington Avenue case, 96 Penn. St. 325
App of Williamsport 41 Atl. Rep. 476;
Dietz vs. Neeneh, 91 Wisconsin 422-427;
Dyer vs. Framingham, 70 Maine, 527;
Hanscom vs. Omaha, 11 Nebraska, 37;
McClusky vs. Chamberlain, 37 N. J. L. 388;
Erie vs. Pennsylvania, 148 Penn. St. 348;

IV.

(1.) Where lands have paid an original assessment for special benefit for the construction of all sewers

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by which they are affected it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of such sewers as to subject them to a second special assessment.

(2.) Taxing the property of the few for a benefit that accrues to the whole city is unequal, unjust, and is a discrimination against the land of those thus assessed. When such tax or assessment becomes a lien upon the lands, it is a taking of property without due process of law and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

Sears vs. Boston, 53 N. E. Rep. 876;
Wright vs. Boston, 9 Cushing, 233-240;
Norwood vs. Baker, 172 U. S. 282-3;
Weed vs. Boston, 172 Mass. 28;
Constitution of Massachusetts, Part II, Chap. 1, Art. 4;
Cooley on Taxation, second ed. page 663;
State Agents vs. Newark, 37 N. J. L. 416 (cases cited.)
Dorgan vs. Boston, 12 Allen 223 pp. 237-238.

V.

Where the record discloses terms or amounts of a tax assessment or servitude against lands to be assessed and such tax or assessment in and of itself amount to the taking or destruction of such property, it is against the provision of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the law.

Smyth vs. Eames, 169 U. S. 466;
St. Louis & San Francisco Railway vs. Gill, 156 U. S. 649;

Chi. Mil. & St. Paul R. R. vs. Minnesota, 134 U. S. 418.

BRIEF AND ARGUMENT.

This case is, as far as I have been able to find in the books, the first of its kind that has ever come before this court. It is not a case of a first original assessment for the construction of a sewer; but is one of continuing quarterly assessments levied upon the lands of the plaintiff in error for the maintenance and operation of the whole sewerage system of the City of Brockton. As the power derived from the statute and ordinance quoted in the statement of the case empowers the City of Brockton to make such charges and lien upon the estate of the plaintiff, and as such lien can be enforced by a sale of the plaintiff's property, it is the contention of the plaintiff in error that all phases of this case and all points involved in it must resolve themselves into a federal question as a taking of property without due process of law, and contrary to the provisions guaranteed under the Fourteenth Amendment of the Constitution of the United States.

In considering the reasoning of the court below as to how they arrived at their conclusions of law, it would seem that in the decision of Seers vs. Street Commissioners of the City of Boston 53 N. E. Rep. 876, the court lay down one law for Boston and, in the case now before this court, which was heard some months after the Seers case, the court by its ruling lay down another law for the City of Brockton.

Referring to the opinion of the court below in this case P..47-48 page 12 Tr. Rec. we find the following:

> "We are of opinion that the petitioner received a special benefit for which he might be

charged, and that this case is free from the elements which in the Seers vs. Commissioners led to the conclusion that the petitioner was assessed without regard to the benefit received by him. No one denies that it was a special benefit to the petitioner to have the sewer built in front of his land. That benefit was a probability that the sewer would be available for use in the future; but the City, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it." Par. 47-48 page 12 Tr. Rec.

Herewith is appended the language of the court in Seers vs. Commissioners of the City of Boston:

"Where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers of Boston such as to subject them to a second special assessment; expenses of this kind should be made the subject of general taxation. The grouping of these various expenses would seem to make it difficult, if not impracticable, under this statute, to make assessments of special and peculiar benefits directly received by particular estates from the construction of sewers near them. And again:

"The benefits to be considered in taxing such estate are not in terms those that are special and peculiar, but, so far as the language goes, may be those that it receives in common with the other estates in the City, and with the inhabitants generally. The fact that the charges to

> be determined are for the construction, maintenance and operation of the sewerage works of the whole City gives some force to the possibility of a construction which includes all benefits; but, whether this construction should be adopted or not, the charges may be determined on any grounds which the Street Commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed such benefits. This fact, in itself, is enough to bring the statute within the prohibition of the Constitution inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law."
>
> Seers vs. Street Commissioners of the City of Boston, 53 N. E. Rep. 876, (1899).

Continuing with the points passed upon in the opinion of the court below we come to the next paragraph (49-50, page 12 Tr. Rec.)

> "The charge allowed by the act is a charge for using the sewer,—a benefit distinct from that originally conferred by building it. By the statute the charge must be a 'just and equitable' charge. These words have been held insufficient to save the constitutionality of a statute in State vs. Commissioners of Streets and Sewers, 9 Vr. 190, and in Barnes vs. Dyer, 56 Vt. 469. But the facts in these cases were too different to make them conclusive."
>
> First part of P. 49-50 page 12 Tr. Rec.

What the court meant by the word in the last sentence quoted above "Too different to make them conclusive" is vague and equivocal as the words used in the c[illegible] referred to in Barnes vs. Dyer 56 Vt. page 471 a[illegible]entical. There can be no misconception as to their meaning; and as their constitutionality was questioned in the above mentioned case and the plaintiff in

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error of this case relied in the lower court upon those identical words, and assigned them in this court as error for the reason that they are not sufficiently certain as a standard of assessment the above mentioned case is given here at length as the opinion also embraces the ruling of the court in State vs Commissioners of Streets and sewers 9 Vr. N. J. 190.

Barnes vs. Dyer 56 Vt., page 471, Par. 3.

> 3. "Special benefit to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only solid foundation upon which local assessments can rest."
>
> The cases differ somewhat as to how the benefit may be determined, whether by the frontage or superficial area; but no such question arises here. The only question here is, whether the phrase, "as they shall deem just and equitable", is sufficiently certain as a standard of assessment. If it could be properly construed as meaning only what was just and equitable in view of the benefit to the premises fronting on the improved sidewalk, it would possibly be sufficient. The exceptions do not state upon what view or theory the assessment in question was made. If said clause is fairly liable to a different construction from the one above stated, then it furnishes no certain legal standard of assessment. Did the court of common council determine the amount of this assessment in view of the benefits to the abutting land; *or* of its value; *or* of the personal convenience to the defendant; *or* of the ability of the defendant to pay; *or* of all these combined? Who can say? Why might they not under this clause assess one man in one view, and another in another view? "Just and equitable" in respect to what? The words import no special limitation.
>
> In State vs. Newark, 8 Vr. (N. J.) 415, (S. C., 18 Am. Rep. 729), the Chief Justice of New Jersey says: "The only safe rule is, that the statute authorizing the assessments shall itself

fix either in terms or by fair implication the legal standard to which such assessment must be made to conform. In no other way can property be adequately protected."

The act in question makes no express allusion to assessment on account of benefit; neither does it limit the assessment to the amount of benefit. Yet, as we have seen, the right to assess at all depends solely on benefits, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land specially benefited.

In New Brunswick Rubber Co. vs. The Commissioners of Streets and Sewers, 9 Vr. (N. J.) 190, (S. C., 20 Am. Rep. 380), it was decided that, where a statute authorized commissioners to assess the cost of a sewer upon lands benefited thereby in such proportion as they should deem just and equitable, no valid assessment could be made under the statute, as it failed to determine the mode of distributing the burden. Knapp, J., in delivering the opinion of the court, says: "In State vs. Mayor etc., of Paterson, 8 Vr. (N. J.) 412, an assessment, certified to have been equitably made, was set aside as governed by no rule. It is not perceived how a legislative enactment, which provides no rule or standard for making an assessment for a public work, can have higher claim for validity."

That case may be regarded as extreme. A much stricter rule was adopted than is contended for here.

In our statutes providing for general taxes, a fixed standard of apportionment has always been adopted, securing uniformity, as far as practicable, in theory at least, in respect to persons and property within the jurisdiction of the body imposing the taxes.

There is greater reason for adhering to this rule in respect to provisions for special assessments. When the money of the few is taken for the benefit of the whole, it is in substance the exercise of despotic power. It is justice when an equivalent is given. In the case of a local improvement, there is an equivalent for the assessment when it only equals the special bene-

fit to the property benefited. But it is the right of the citizen to have the law, which reaches into his pocket specially, so guarded as to secure him approximate justice according to legal and constitutional principles. The language of Judge Agnew in the Washington avenue, 69 Penn. St. 352, is pertinent: "In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers, without perceiving the progression, until the usurption becomes so firmly fixed by precedents it seems to be impossible to recede or to break through them."

Our constitution provides that "every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection."

This is less restrictive than the constitutions of many States; but the cases which have established the rule that the statute authorizing an assessment must fix the legal standard to which it shall be made to conform, have not turned on the phraseology of constitutional provisions. It is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so there is no protection against arbitrary injustice in the imposition of taxes. To secure this protection courts have held that legislative enactments, must set up a standard, fix a rule, to be conformed to as a guide in all cases, an uniform, certain rule, so far as reasonably practicable, and not susceptible to different applications to different individuals to the class to which it applies. If the enactment fails in this regard, it is deemed fatally defective. The proposition is sound, because it is an adherence to the fundamental principles which in a constitutional government are designed to protect the individual against injustice and oppressioin.

We think the act in question failed to set up a standard by which all assessments for sidewalks in Vergennes must be made; that the

> words, "just and equitable," do not import, with reasonable certainty, a limitation to particular benefits to property benefited. We do not know but that one member of the common council construed the words as applying to one consideration, and another member to a different consideration; nor that any of them limited the consideration to benefits. In short the enactment was inadequate to the purpose designed by it.
>
> This view renders it unnecessary to pass upon the other points of defence.
>
> Judgment reversed and cause remanded.

Referring now to Par. 51-52 page 12 printed Tr. Rec. we find in the opinion of the court below the following:

> "It is said there is no provision for a hearing, but under the ordinance the only questions are whether the petitioner's sewer enters the common sewer, and what amount of sewerage is shown by the meter reading to have been delivered to the sewer, if the petitioner wished to be heard on either of these facts no doubt he would resort to the courts."

Pausing here to consider such part of par. 51-52 as has been quoted, it would seem, from the language used, that the court entirely overlooked the nonprovision for a hearing in the statute, or ignored that fact entirely. Of course, if the statute is unconstitutional and void the ordinance of the City of Brockton can have no higher validity.

> "If the petitioner wished to be heard on either of these facts, no doubt he could resort to the courts." Par. 51-52 page 12 Pr. Tr. 3rd sentence in paragraph.

This sentence of the opinion of the court seems to convey the very doubt that exists that the plaintiff in error could demand, as a right, a hearing; and if a

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hearing were demanded the language of the court carries with it by fair implication a doubt as to whether the plaintiff might or might not be granted a hearing. Be that as it may, the plaintiff in error should have had a right to a hearing granted him by the legislative act and not by favor or courtesy of the court. Stewart vs. Palmer 74 New York page 188 second paragraph.

> "I am of the opinion that the Constitution sanctions no law imposing such assessments, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law that the assessment has, in fact, been fairly apportioned. The Constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice." Stewart vs. Palmer 74 New York, page 188.

Continuing with the opinion of the court below par. 51-52 page 12 Tr. Rec. fourth sentence is as follows:

> "On the rate per thousand gallons fixed by the ordinance he was not entitled to be heard."

This ruling is contrary to well established law: Smith vs. Eames 169 U. S. 466, St. Louis & San Francisco R. R. vs. Gill, 156 U. S. 549; Chicago, Milwaukee and St. Paul Railway vs. Minnesota, 134 U. S. 418 and cases cited.

Continuing to quote from the opinion of the court below par. 51-52 the first half of the next sentence is as follows:

> "So far as appears, if he is dissatisfied with the rate he is not obliged to use his sewer".

Remark upon the sentence quoted above is hardly necessary, the assertion is frivolous. It seems strange that such a sentence should have crept into the opinion by the Chief Justice of the highest court of Massachusetts, neither is it necessary to quote a law to controvert it. It is, of course, a matter of common knowledge that the Board of Health or Police have power to compel those on the line of the sewer to connect with the sewer when it is deemed necessary for the public health or welfare.

In the same paragraph 51-52 page 13 Pr. Tr. Rec. end of fourth line the court uses the following language

> "The final decision must be somewhere and may as well be left to the City Council as to anyone."
>
> New London Northern Railroad vs. Boston and Albany Railroad 102 Mass. 386, 387-388.
>
> If left to them they are not obliged to hear the several parties who may be affected before fixing a general rate, clearly the rate might have been fixed by the legislature without a hearing.
>
> Parsons vs. District of Columbia 170 U. S. 44.

The case of Parsons vs. District of Columbia cited by the court below is so perfectly familiar to this court that only brief reference will be made to it. This was the case of a laying of a water main tax under an act of Congress providing that all assessments for laying water mains in the District of Columbia should be at a specified rate per front foot on abutting lots, and giving commissioners power to lay water mains wherever they deemed necessary for the public safety, comfort or health. The law under which this case was decided is well settled, and is as distinctly different from the law governing the case of a special assess-

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ment for a local improvement, especially an annual sewerage charge or quarterly assessment for the use of the sewer, as are the laws that control the collection of poll tax or special licenses granted for the prosecution of business or trade. The Parsons vs. District of Columbia case was a case of urgency, of absolute necessity, and not a case of special assessments where special and peculiar benefits to the property owner were to be considered. The language of Mr. Justice Shiris defines the difference between a tax or assessment prescribed by a legislative body having full authority over the subject and one imposed by a municipal corporation acting under limited and delegated authority.

> "There is a wide difference between a tax or assessment prescribed by a legislative body having full authority over the subject, and one imposed by a municipal corporation, acting under a limited delegated authority, and the difference is still wider between a legislative act making an assessment, and the action of mere functuaries whose authority is derived from municipal ordinances,"

and further on in the opinion, last sentence in second succeeding paragraph:

> "Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes, in its nature, judicial in such a sense that the property owner is entitled to a hearing or to notice and opportunity to be heard."
> Parsons vs. District of Columbia 170 U. S. 44.
> Spencer vs. Merchant, 100 N. Y. 585.
> Hagar vs. Reclamation District 108, 111 U. S 701.

Continuing with the opinion of the court below paragraph 53-55 page 13 Tr. Rec. is as follows:

> "And whatever difference there may be between the legislature of the state and inferior, although legislative, bodies in cases where particular property is to be valued still, when a uniform and self adjusting rule is adopted under which no question as to proportion can arise or any other question except the general one whether the rate is high, we are of opinion that the legislature has power to authorize a City Council to determine that question as it is done here. United States vs. New Orleans 98 U. S. 381; Railroad Commissioners case 116 U. S. 307; Spencer vs. Merchant; 125 U. S. 345-356; Chicago, Milwaukee and St. Paul Railway vs. Minnesota 134 U. S. 418, 459; Regan vs. Farmers Loan and Trust Company 154 U. S. 362, 394; see further Leominster vs. Colin 139 Massachusetts 384."

The plaintiff in error respectfully submits that the cases cited by the court below in its opinion as upholding the proposition of law contained in par. 53-55 page 13 pr. Tr. Rec. do *not* uphold the proposition laid down by the court. The court lost sight of the fact that notice and hearing is *always* provided for, and, while the cases in the United States reports cited above are so familiar to this court that an extended discussion is unnecessary, I will only refer to such part of each case as bear upon the question of notice and hearing. The case of U. S. vs. New Orleans 98 U. S. 381 will be passed by with the remark that as this case was for the recovery of a judgment against the City of New Orleans for bonds and coupons issued by the said City of New Orleans that the law is entirely inapplicable to the case at hand, and we fail to see why the court below should have cited it as upholding their opinion.

The next case, Railroad Commission cases 116 U. S. 307, was a case to pass upon the power of railroad commissioners to fix or limit charges under power derived by an act of legislature of the state of Mississippi.

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The law in such cases is so entirely different from that governing the case now before this court that we are at a loss to understand why the court below should have cited this case when there were such a vast number of cases to select from having a direct bearing upon the case in hand. The distinction between the law governing interstate commerce and the law which regulates the laying of assessments for special and peculiar benefits is marked, and as we before stated, the powers of commissioners appointed by a legislature with absolute power to regulate charges and reform abuses in interstate commerce, always providing they keep, within constitutional limitations; is a law unto itself, and is distinct and apart from that which controls assessment for local improvements where special benefits and proportion are to be considered.

The next case cited by the court below in its opinion, is the well known case of Spencer vs. Merchant 125 U. S. 337 that was a case cancelling an original assessment imposed under Chapter 217 laws of 1869 as amended by Chapter 619 of the laws of 1870, which act, so far as it authorized assessment in question was said to be unconstitutional and void as depriving the parties assessed of their property without due process of law, by the Court of Appeals of the State of New York. The case came before this Court on the question of validitating a void assessment without giving the owners of the land assessed an opportunity to be heard upon the assessment.

From the opinion of the Court as voiced by Mr. Justice Gray is quoted the following: Fourth Paragraph.

> "The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts, upon the

ground that it acted unjustly or without appropriate and adequate reason;" and again middle of lower paragraph, first column, page 345:

"A hearing is given by the act as to the apportionment among the land owners which furnishes them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent." And again end of same paragraph:

"The land owners were given a hearing, and so there was no constitutional objection in that respect nor was that hearing illusory. It opened to the land owner an opportunity to assail the constitutional validity of the act under which a loan and apportionment could be made, and that objection failing, it opened the only other possible question, of the mode and amounts of the apportionment itself."

The next case cited in the opinion of the court below is that of Regan vs. Farmers Loan and Trust Company. Remarks quoted above in reference to railroad Commission cases 116 U. S. will apply also to the case of Regan vs. Farmers Loan and Trust Company.

The statute of 1892, Chapter 245 Section 1, is unconstitutional and void and repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States for the following reasons: First, As providing for neither notice, hearing, nor appeal of the owner of land to be assessed.

Second, that the words "just and equitable" as used in the statute furnishes no legal standard by which to apportion the amount of the assessment in proportion to the amount of special and peculiar benefits to be received. The words are vague, uncertain and import no special limitation.

Third, the power given by the statute to the City Government of Brockton that "they may change the rate from time to time" clearly shows an intention to place in the hands of the common council an absolute power to charge what, in their opinion, they may deem proper, without regard to its reasonableness or the

special and peculiar benefits to be derived from such charges, and is conclusive evidence of the intention of the legislature to ignore the Constitutional right of the land owner.

The sewerage commissioners of the City of Brockton, acting as a quasi-judicial body, are empowered to levy a quarterly assessment, or rental, on every estate connected with the sewer. Such assessment becomes a lien upon the estate, and the amount of such assessment can be collected by the sale of the property thus assessed. Every property owner should be given an opportunity to be heard, before his estate is doomed to pay a tax; yet the Brockton city ordinance relating to sewers, or the statute under which it was framed, does not provide for either hearing or notice, and the determination of the board of sewerage commissioners, is made final. No appeal to a jury or other tribunal is provided. The petitioner is doomed unheard, and without appeal, to be deprived of his property to the extent of the assessment without due process of law, in violation not only of the Constitution of Massachusetts but also of the Fourteenth Amendment of the Constitution of the United States.

It has been repeatedly held that a statute which regulates assessment proceedings, and fails to provide an opportunity for a hearing, is invalid under the Constitution of the United States, and under the constitutions of most of the states of the Union.

> "Upon this subject there is a general concurrence of authorities in the affirmative. It is a fundamental rule that in judicial or quasi-judicial proceedings, affecting the rights of the citizen, he shall have notice, and be given an opportunity to be heard, before any judgment decree, order or demand shall be given and established against him. Tax proceedings are not, in the strict sense, judicial, but they are quasi-judicial, and as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when

the conclusive steps are to be taken. Provision for notice is, therefore, part of the 'due process of law' which it has been customary to provide for those proceedings; and it is not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended, or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

Cooley on Taxation, 2d Edition, page 363;
Constitution of Massachusetts, Part First, Art. XII;
Constitution of the United States, Fourteenth Amendment Sec. I;
Parsons vs. District of Columbia, 170 U. S. 45, 52, 54;
Hagar vs. Reclamation District, 111 U. S. 701, 709;
New Brunswick Rubber Company vs. Commissioners of Streets, 9 Vroom 190;
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112;
English vs. Wilmington 37 Atlantic Rep. 158, 162;
Stewart vs. Palmer, 74 N. Y. 183;
Dietz vs. Neenah, 91 Wis. 422, 427;
New London Northern Railroad Co. vs. B. & A. R. R. Co., 102 Mass. 386;
Remsen vs. Wheeler, 105 N. Y. 579;
Matter of Trustees of Union College, 129 N. Y. 308;
Butler vs. Supervisors, 26 Mich. 22;
Thomas vs. Gain, 35 Mich. 156;
Campbell vs. Wiggins, 83 Ind. 473;
Davidson vs. New Orleans, 96 U. S. 97.

"The general rule is that the method pursued should be appropriate to the case, adapted to the end to be attained, just to the parties, with notice and an opportunity to be heard before an appropriate and impartial tribunal."
Cooley Constitutional Limitation (6th Ed.) 694-695:

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Mills Eminent Domain, § § 84, 85;
Lewis Eminent Domain, §313;
Buffalo Boyau B. & C. R. R. Co., vs. Ferris, 26 Tex. 599.

The constitutional validity of a statute is to be tested by what may be done under it, not what has occurred.

Stuart vs. Palmer, 74 N. Y. 188, Earl, Judge, rendering the opinion said: "It matters not upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done." This language is quoted with approval in Gilman vs. Tucker, 128 N. Y. 190 at 200.

Colon vs. Lisk, 157 N. Y. 188 at 194-5.

"In discussing the constitutionality of this Act, it is to be remembered that the question is to be determined not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority."

Stuart vs. Palmer, 74 N. Y. 183.
Gilman vs. Tucker, 128 N. Y. 190-200.
Brown vs. City of Denver, 7 Col. 305 at 312.
Dexter vs. City of Boston, Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1900. North-East Reporter, Vol. 57, No. 5, June 15, 1900, page 379 at 380.
Collins vs. New Hampshire, 171 U. S. 33, 34.
Henderson vs. Major, 92 U. S. 268.
Minnesota vs. Barber, 136 U. S., 313 at 319.

In Davidson vs. New Orleans, *supra, the* language of the court is as follows:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in

the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It cannot be said, that because the land of the plaintiff in error was connected with the sewer at his request that he waived his right to object to the constitutional validity of the ordinance or statute.

New Brunswick Rubber Company vs. Commissioners of Streets and Sewers, page 197.

"Connecting with the Sewers cannot be regarded as an acquiesence on their part; their right so to connect is not made to rest on condition of paying the assessment; the consent of the commissioners and their own willingness is all that is needed for that. It would be as unreasonable to hold a man to the payment of an illegal assessment on his lands for the paving of a street, because, after the assessment, he drove his carriage over the pavement, as to oblige him to pay an improper assessment for building a sewer, for the reason that he had connected the land so assessed with the sewer, the improvement is made for the public benefit, and the use of it the prosecutors, as part of the public are entitled to share."

A land owner cannot be held to pay an improper assessment, because he has purchased the land subject to such assessment, and assumed to pay it as part of the consideration.

State, Evans, pros., vs. Mayor Est. of Jersey City, 6 Vroom 381.

All that the silence, acquiesence and acts of the prosecutors can bind to is submission to a proper tax or assessment when legally imposed for the payment of their just proportion of the reasonable costs of the improvement.

Many other reasons were presented and urged on the argument for setting aside the assessment, but it is deemed unnecessary to consider

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them as the assessment must be set aside for the reasons above stated.
New Brunswick Rubber Co. v. Com. of Streets and Sewers, 9 Vr. (N. J.) 19.

NATURE OF THE SEWERAGE CHARGE.

The term "sewerage rental", as used in the ordinance relating to sewerage and sewerage assessments of the City of Brockton, is, in reality, a tax, and, in so far as it relates to the maintenance and operation of the sewerage works, which include, among other items, the salaries of the employees and all other expenses for the operation of the sewer department of the City of Brockton, is, from its nature, a tax imposed for the benefit of the whole City of Brockton, irrespective of individual ownership of land, and constitutes a public burden, and should be imposed as a general tax on personal as well as on real estate. That such expenses are proper subjects for general taxation, and not for special assessments, see

Beals v. Street Commissioners of Boston, 53 North-Eastern Rep. 876;
Hammett v. Phila., 65 Pa. St. 146; Washington Ave. 69 Pa. St. 352; App. of Williamsport, 41 Atl. Rep. 476;
Dietz v. Neenah, 91 Wis. 422, 427;
Dyar v. Farmington, 70 Me. 527;
Hanscom v. Omaha, 11 Neb. 37.

In Erie v. Russell, 148 Penn. St. 384, the court says, "Why should a sewer, demanded and constructed by the city, and paid for by assessments on the property fronting on the street under which it is laid, be maintained and reconstructed, on the order of the municipality, at the expense of such property? It was made, by the action of the city, a part of its system of sewerage, which is as necessary for the health

of its people as its paved streets are for their use. Its construction was at the expense of the abutting property, and properly so, in discharge of the obligation arising from particular benefits conferred. It is now a constituent of the general system ordained by the city for the convenience and health of its inhabitants. This system confers benefits which are general. It is a public necessity, and the expense of maintaining it should be provided for by general taxation."

See Child v. Boston, 4 Allen, 41, 52;
Emery v. Lowell, 104 Mass. 13-16;
Stewart vs. Palmer, 74 N. Y. 183;
Norwood v. Baker, 172 U. S. 282-3;
New Brunswick Rubber Co. v .Street Comrs. 9 Vroom, 190;
Barnes v. Dyer, 56 Vt. 469;
Thomas v. Gain, 35 Mich. 155-156;
Dexter vs. Boston, 57 N. E. Rep. 379.

The assessment is a tax, and takes its essential character from the powers of government under which it is made. If this assessment can be imposed arbitrarily, simply by calling it a rent, then every assessment for local improvement can be treated in the same way, and the decision in Weed v. Boston, 172 Mass. 28, holding a sewer assessment unconstitutional, because unreasonable, could have been easily avoided by calling it a rent for the use of the sewer.

The term sewerage rental or assessment is applied to impositions of this nature, because they are laid in respect to particular estates, to distinguish them from the ordinary ratable taxes. But both terms are assessments in respect to the mode of ascertaining the amount to be paid; and both are taxes in respect to the power under which they are imposed.

In Mount Auburn Cemetery v. Cambridge, 150 Mass. 12, the court, in speaking of an assessment for a common sewer, under Public Statutes, c. 50, says, page 14: "It it a public tax, in the sense

that it is levied for a public object; it is a local tax, in the sense in which most public taxes are local, that it is limited to a certain locality; it differs from ordinary public taxes, in that it is not levied upon the polls and estates within a municipality or district in respect of public or common benefits, but upon particular lands in respect of a particular benefit received by them from the excution of a public object. Taxes voted by towns and cities for public ways and common sewers are for public objects, and are, in every sense, public taxes.

Wright v. Boston, 9 Cush. 233-240;
Boston v. Boston & Albany R. R., 170 Mass. 95-98.

As a general tax or assessment laid primarily for the benefit of all the inhabitants of the City of Brockton, it is invalid. All taxes, whether general taxes or special assessments, are required by the Constitution to be proportional and reasonable.

Constitution of Mass., Part Second, Chap. I., Art. IV.;
Mt. Auburn Cemetery v. Cambridge, 150 Mass. 12-14.

The distinction between general taxes and special assessments is based on the incident of the chief benefits of the expenditure. It is well established that a special assessment upon particular estates is permissible, under the Constitution of this Commonwealth, and under the Constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to the amount not exceeding such special and peculiar benefits.

Boston v. B. & A. R. R. Co., 170 Mass., pages 95, 98;
Weed v. Boston, 172 Mass. 28;

Proprs. Mt. Auburn Cemetery v. Cambridge, 150 Mass. 12-14;
Norwood v. Baker, 172 U. S. 282-3;
Sears v. Boston, 53 N. E. Rep. 876;
Wright v. Boston, 9 Cush. 233-240;
Hammett v. Philadelphia, 65 Pa. 146;
Bogert v. Elizabeth, 27 N. J. Eq. 568-569;
City of Erie v. Russell, 148 Pa. St. 384, 386;
Appeal of City of Williamsport, 41 Atlantic Rep. 476;
Cooley on Taxation, 2d ed., page 663;
Desty on Taxation, Vol. I., pages 26, 30, 275;
Dyar v. Farmington Village Cor., 70 Maine, 527;
Hanscom v. Omaha, 11 Neb. 37;
Baltimore v. Huges, 1 Gill. and J. 492;
Howes v. Glas. 48 N. E. 922;
McClusky v. Chamberlain, 37 N. J. L. 388;
Agens v. Newark, 37 N. J. L. 416;
State v. Chamberlain, 8 Vroom, 388;
Hewes v. Momence, 45 N. E. 302.

A general tax for an improvement of general benefit, to be proportional and reasonable, must be assessed upon all estates, real and personal, within the municipality benefited.

Wright v. Boston, 9 Cushing, 233-240;
Northampton v. County Commissioners, 145 Mass. 108-109;
Mt. Auburn Cemetery v. Cambridge, 150 Mass. 12, 13;

The maintenance and operation of the sewerage works include the expenses of the sewerage department and the salaries of its employees, and are in no sense special and peculiar benefits to land owners, but are public works of the first importance to, and necessary for each inhabitant of the City of Brockton, irrespective of his ownership of land. Such current expenses are as properly a part of the running expenses of the city, to be raised by general taxation, as are the charges for street cleaning, lighting or police, or any other muni-

cipal function which relates to the health and comfort of the citizens, and which benefits one and all equally.

Dogan v. Boston, 12 Allen, 223, pp. 237-238.

The quarterly assessment or rental charge for maintaining and operating the sewers of the City of Brockton throws the burden upon a comparatively few of the land owners of the city for a benefit that is primarily public in its nature. Such improvements that accrue to every inhabitant of the city are a subject for general taxation.

> In Wright v. Boston, 9 Cushing, page 340, Chief Justice Shaw says: "The principle generally adopted here is that public improvements, although local, must be paid for at the public expense."
>
> In Child v. Boston, 4 Allen, 41, Judge Hoar says, at page 52: "But after a common sewer is built, and until some change in its location or construction is directed by the board of alderman, its care and maintenance devolve wholly upon the city, who provide for keeping it in order through such agents and officers as they choose to select and appoint. The superintendent of common sewers, the officer designated for this purpose in the City of Boston, is chosen by the concurrent vote of two branches of the city council, is removable at their pleasure, and receives such compensation as they determine. City Ordinances of Boston (ed. of 1856), 487. * * * The charge of sewers and drains is not an obligation imposed upon the city by legislative authority, exclusively for public purposes, and without its corporate assent. It was voluntarily assumed, by the acceptance of the act conferring the power."

The distinction between the special assessment which can be imposed upon abutters and the general tax which must be borne by all, is recognized both by the economists and the courts of other states, irrespective of

constitutional restrictions, and such charges as the annual operating expenses of sewerage works are uniformly declared appropriate objects for general taxation, but not for special assessments.

Essays on Taxation, by E. R. A. Siligman, pp. 285, 286, 304;
Special Assessments, by Victor Rosewater, Columbia University Studies in Political Science, Vol. II., No. 3, pp. 88, 89;
Hare, American Constitutional Law, Vol. I., p. 310;
Cooley on Taxation, 2d Ed., p. 663;
Desty on Taxation, Vol. I., pp. 26, 30;
Hammett v. Philadelphia, 65 Pa. St. 146;
Washington Ave., 69 Pa. St. 352;
Erie v. Russell, 148 Pa. St. 384, 386;
Dietz v. Neenah, 91 Wis. 422, 427;
Dyar v. Farmington, 70 Maine, 527;
Hanscom v. Omaha, 11 Neb. 37.
McClosky v. Chamberlain 37 N. J., 388.
Illinois Central Railroad v. Decatur, 147 U. S. 190.

Analogous cases, where special assessments for similar purposes have been held invalid, are found in

Hammett v. Philadelphia, 65 Pa. St. 146;
Washington Ave., 69 Pa. St. 352;

That the function of the board of sewerage commissioners, in determining the amount of each assessment, is not simply executive, but is of a judicial character, is clear,—

Palmer v. McMahon, 133 U. S. 660;

and it is as unjust in principle to allow such a function to be exercised *ex parte* as to permit a person to be deprived of his property in an action at law without a hearing.

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Erie v. Russell, 148 Pa. St. 384, 386;
Dyar v. Farmington, 70 Maine, 527;
Hanscom v. Omaha, 11 Neb. 37;
Stehmeyer v. City Council, 31 South-Eastern Reporter, 322, 331;
McClosky v. Chamberlain, 37 N. J. L. 388;
N. Y. Life Ins. Co. v. Prest, 71 Fed. Rep. 815.

The definition made by Seligman in his "Essays on Taxation," page 304, marks the distinction, and is supported by the authorities:

> "A special assessment is a payment, made once and for all, to defray the cost of a specific improvement to property, undertaken in the public interest, and levied by the Government in proportion to the particular benefit accruing to the property owner."
>
> "A tax is a compulsory contribution from the person to the Government, to defray the expenses incurred in the common interest of all, without reference to special benefits conferred."
>
> See Desty, Vol. I., p. 275;
> Vol. II., pp. 1237, 1239.
> 2 Dill Mun. Corp. (4th Ed.), Sections 761, 809.

I respectfully ask for a reversal of the judgment of the Court below; and that this Court enter judgment for Plaintiff in Error by directing that a Writ of Certiorari issue as prayed for and such other relief, including costs, as in the judgment of this court he may be entitled to in the premises.

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